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In the Supreme Court of the United States

OCTOBER TERM, 1975

ROBERT AND SANDRA SCHAEFER, ET AL., PETITIONERS

v.

FIRST NATIONAL BANK OF LINCOLNWOOD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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The United States submits this Memorandum as *amicus curiae* in response to the Court's invitation of June 23, 1975.

STATEMENT

In August 1967, a federal grand jury charged several individuals with having manipulated the price of the stock of Hercules-Galion Products, Inc. ("Hercules") between 1965 and 1967, in violation of the federal securities laws, including Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a) ("Securities Act"), and Section 9(a)(2) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) ("Exchange Act"), and in violation of the federal mail and wire

fraud statutes, 18 U.S.C. 1341 and 1343 (Pet. App. 6a–8a).[1]

Petitioners, individually and on behalf of a class of persons who had purchased Hercules stock between 1965 and 1967, instituted this civil action against the criminal defendants, certain brokerage firms at which various of the criminal defendants were employed, certain officers of Hercules, and the American Stock Exchange ("Amex") and certain of its specialists. The complaint alleged substantially the same events as were alleged in the indictment and charged the criminal defendants with violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a); Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78i(a)(2) and 78j(b); and Section 1 of the Sherman Act, 15 U.S.C. 1; and with common law fraud (Pet. App. 7a–8a). The other defendants were charged with failure to take appropriate measures to prevent the manipulation.[2]

The district court dismissed petitioner's Sherman Act claim on the grounds that the antitrust remedy was superseded by the more specific remedies of the federal securities laws; that such manipulations con-

[1] Most of those indicted were convicted. See, *United States* v. *Projansky*, 465 F. 2d 123 (C.A. 2).

[2] The heart of the manipulation involved an alleged scheme by which the criminal defendants and others regularly purchased from each other large blocks of Hercules stock on the Amex at prearranged prices, creating public interest in the stock which enabled them to sell it at a profit. As a result of this activity, the price of the stock increased from $6 to more than $14 per share. The same conduct was alleged as the basis for all counts of the complaint.

stituted fraud rather than restraint of trade at common law and consequently were not covered by the antitrust laws; and that by enacting the Securities Exchange Act Congress had intended to limit recovery to actual damages rather than treble damages under the antitrust laws (Resp. App. A1–A12). Subsequently, the district court dismissed the claims against several of the defendants based upon the federal securities laws and common law fraud on the ground that those claims were barred by the three-year limitations period of the Illinois Securities Act. The district court reaffirmed the dismissal of the antitrust claims (Pet. App. 2a–5a).

The court of appeals affirmed the dismissal of the antitrust claims (Pet. App. 26a–28a), reasoning that "[p]rivate parties may only bring antitrust claims against an exchange or its members when there is no other vehicle for review," and that the plaintiffs had such a vehicle under the securities acts (Pet. App. 27a); and that the manipulation scheme underlying the plaintiffs' claim "was envisioned to be fully dealt with under the securities acts" (Pet. App. 28a). The court reversed the district court's dismissal of the federal securities law claims on the basis of the statute of limitations, holding that the limitation period had been tolled, with respect to certain of the defendants, until the fraud was discovered at the time the criminal indictment was returned (Pet. App. 15a–24a).[3] How-

[3] Rodman & Renshaw, a defendant securities broker-dealer, has petitioned this Court for a writ of certiorari to review this portion of the court of appeals' ruling. *Rodman & Renshaw* v.

ever, the court affirmed the dismissal of the Amex and its specialists, finding no tolling of the period (Pet. App. 24a–26a).

DISCUSSION

1. In holding that the existence of a damage remedy under the securities laws preempts private remedies under the antitrust laws, the court of appeals acted contrary to a long line of decisions by this Court which hold that repeal of the antitrust laws by implication is not appropriate in the absence of a "plain repugnancy between the antitrust and regulatory provisions." *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 348, 350–351, and cases cited therein. Repeal of traditional antitrust remedies is implied only where "necessary to make [another regulatory scheme] work." *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357.

Repeal of private antitrust remedies is not necessary to effectuate the securities laws' prohibition of stock manipulation schemes. Here, unlike the situations in *Gordon* v. *New York Stock Exchange, Inc.,* No. 74–304, decided June 26, 1975, and *United States* v. *National Association of Securities Dealers, Inc.,* No. 73–1701, decided June 26, 1975, maintenance of the antitrust action would create no danger that participants in the securities industry might be subjected to inconsistent standards, since the conduct at issue was alleged to violate both the Sherman Act and the

Schaefer, No. 74–1407. A memorandum setting forth the views of the Securities and Exchange Commission on that case has been filed with the Court.

securities laws.[4] Indeed, in these circumstances the antitrust claim would supplement the enforcement of the securities laws.

There is no indication that, by creating a specific remedy for stock manipulations in Sections 9(a)(2) and 28(a) of the Securities and Exchange Act, Congress thereby intended to repeal private antitrust damage remedies that alternatively might be available to a party victimized by such a manipulation. This Court has repeatedly declined to construe special industry regulations that provide damage remedies as an implied repeal of the antitrust laws. See *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 218; *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Union No. 100,* No. 73–1256, decided June 2, 1975.

Nor, contrary to the court of appeals' ruling, does the limitation of recovery to actual damages under the securities laws indicate a congressional intent to preclude an alternative remedy, such as that available under the antitrust laws, that provides recovery in excess of actual damages. It is well established, for example, that where a claim under the securities laws is joined with a claim based upon common-law fraud or a state blue-sky law, the limitation upon recovery of damages under the federal securities laws does not preclude

[4] In *Gordon* and *National Association of Securities Dealers* this Court held that the antitrust laws were not applicable to practices which had either been approved by the Securities and Exchange Commission or were subject to the review of the Commission and had not been disapproved by that body.

punitive damages or attorneys fees under state law. See, *e.g., Flaks* v. *Koegel,* 504 F. 2d 702, 706–707 (C.A. 2); *Young* v. *Taylor,* 466 F. 2d 1329, 1337–1338 (C.A. 10); and *Coffee* v. *Permian Corp.,* 474 F. 2d 1040 (C.A. 5), certiorari denied, 412 U.S. 920. See III Loss, *Securities Regulation* 1624 (2d ed. 1961), VI Loss, *Securities Regulation* 3781–3783 (1969 Supp.).[5]

2. While we believe that the court of appeals' affirmance of the district court's dismissal of the antitrust count was erroneous as a matter of law, the case nevertheless involves a relatively unique situation that is not apt to recur with sufficient regularity to warrant review by this Court. In fact, neither we nor petitioners are aware of any prior cases in which manipulations involving securities, as distinguished from commodities, have been challenged as violative of both the antitrust and securities laws (Pet. 14). The decision therefore will have a negligible effect upon the efficacy of private treble-damage actions in supple-

[5] The court of appeals did not refer to the district court's dictum (Resp. App. A7) that, wholly apart from the interrelationship between the securities acts and the Sherman Act, stock market manipulations were not covered by the antitrust laws because they constituted fraud rather than restraint of trade at common law. This dictum is, we submit, incorrect. Under certain circumstances market manipulations may give rise to a cause of action under the Sherman Act. See *United States* v. *Patten*, 226 U.S. 525; *Chicago Mercantile Exchange* v. *Deaktor*, 414 U.S. 113. Consequently, in view of the well-established principle that a complaint cannot be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle it to relief (*Conley* v. *Gibson*, 355 U.S. 41, 45–46), we believe the courts below erred in dismissing the antitrust count.

menting antitrust enforcement. Moreover, since the court of appeals' decision is restricted to the issue of overlapping private remedies, the decision would not significantly impede the government's antitrust enforcement efforts.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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